TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 176.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

A. H. CARTER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED MAY 18, 1891.

(14,653.)

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1 UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judges of the supreme court of the State of Arkansas, Greeting:

Because in the record, pleadings, and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Arkansas before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. H. Carter, plaintiff, and St. Louis and San Francisco R'y, defendants, wherein was drawn in question the construction and validity of certain clauses, articles, sections, and amendments of the Constitution of and laws of the United States of America, and the decision was against title, rights, privileges, and franchises specially set up, based upon claims and founded under and upon such clauses, articles, sections, and amendments of the Constitution of and laws of the United States, a manifest error hath happened, to the great damage of the said St. Louis and San Francisco R'y Co., as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

2 Witness the Honorable Melville Weston Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of Jan'y, A. D. 1891, and of the Independence of the United States the one hundred and fifteenth.

(The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.)

RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America, Eastern District of Arkansas.

Allowed by—
S. R. COCKRILL, *Chief Justice.*

STATE OF ARKANSAS:

In the Supreme Court.

I, William P. Campbell, clerk of the supreme court of the State of Arkansas, hereby certify that, in obedience to the mandate of the foregoing writ of error, a duly-certified transcript, under the seal of said court, of the record and proceedings in the cause therein stated, with all things concerning the same, is hereto attached.

In testimony whereof I hereto set my hand as clerk of said supreme court and affix the seal — said court, at my office, in the city of Little Rock, this 15th day of April, A. D. 1891.

Seal of the Supreme Court of Arkansas.

W. P. CAMPBELL, *Clerk.*

3 The United States of America to A. H. Carter, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Arkansas, wherein The St. Louis and San Francisco Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable S. R. Cockrill, *S. R. Cockrill*, judge of the supreme court of the States of Arkansas, this 17th day of January, A. D. 1891.

Seal of the Supreme Court of Arkansas.

S. R. COCKRILL.

3½ I hereby acknowledge service of the within citation this 14th day of Feb'y, A. D. 1891.

FREDERICK & MARMON,
By W. L. MARMON,
Attorney for Appellee in this Cause in Supreme Court of Arkansas.

4 Please before the Hon. Jno. S. Little, judge of the Sebastian circuit court within and for the Fort Smith district, at the April term, 1888, the following, among other proceedings, were had, to wit:

Complaint.

In the Sebastian Circuit Court for the Fort Smith District.

A. H. CARTER
vs.
ST. LOUIS AND SAN FRANCISCO R. R. Co. } Complaint at Law.

Plaintiff brings this suit against the said defendant for violations of act CXXIX, acts of Arkansas, 1887. Plaintiff avers that the defendant is now and was on the 21st day of June, 1887, a corporation operating a line of railroad in this state for a distance of more than seventy-five miles in this State.

That on the 21st day of June, 1887, plaintiff purchased of defendant, at the city of Fort Smith, Ark., one round-trip, first-class passenger ticket from Fort Smith, Ark., to Lancaster Station, Ark., being a distance of nineteen miles going and nineteen miles returning, for which ticket said defendant demanded of said plaintiff the

sum of one dollar and seventy cents, which amount plaintiff then and there paid to said defendant.

The plaintiff paid said defendant 4½ cents per mile for passenger fare when the law allowed defendant to charge and receive but three cents per mile. By said act of defendant in demanding and receiving from said plaintiff the said sum of money for passage over defendant's said railroad, and the said defendant then and there became liable to the said plaintiff — the sum of three hundred dollars.

Plaintiff therefore prays judgment against the said defend-
5 ant, The Saint Louis and San Francisco Railroad Company, for three hundred dollars and his reasonable attorneys' fees and the costs of this suit according to the laws of the State of Arkansas.

FREDERICK, MORMAN & FREDERICK,
Att'ys for Plaintiff.

STATE OF ARKANSAS, }
Sebastian County. }

A. H. Carter says that he believes the statements of the foregoing complaint are true.

A. H. CARTER.

Subscribed and sworn to before me this 1st day of Aug., 1887.
JAMES CARBARY,
[SEAL.] *Notary Public.*

(Endorsed:) Filed Aug. 8th, 1887. J. C. Stalcup, clerk.

Summons.

Upon the filing of the above complaint the clerk issued a summons for the defendant, which was served Aug. 12th, 1887, by delivering a true copy of the same to Chas. Hall as agent of the St. L. & S. F. R'y Co., at Fort Smith.

October Term, 1887.

(Caption omitted.)

On this day, by consent, time is extended until Tuesday of next (2nd) week to answer.

Answer.

(Copy of amended answer.)

(Caption omitted.)

Comes defendant herein and, for answer to plaintiff's complaint, says that it denies that this defendant was, on the 21st day of June, 1887, operating a line of railroad in the State for a distance of more than seventy-five miles.

6 Defendant denies that on the 21st day of June, 1887, plaintiff purchased of this defendant at the city of Fort Smith, Arkansas, one round-trip first-class passenger ticket from Fort Smith, Arkansas, to Lancaster Station, Arkansas, being a distance of nineteen miles going and nineteen miles returning; denies that for said ticket defendant demanded of this plaintiff the sum of one dollar and seventy cents, which amount plaintiff then and there paid to said defendant.

Defendant denies that plaintiff paid said defendant 4½ cents per mile for passenger fare when the law allowed the defendant to charge but three cents per mile.

Denies that by said act in demanding and receiving from said plaintiff the said sum of money for passage over defendant's railroad the said defendant then and there became liable to pay to the said plaintiff the sum of three hundred dollars.

Defendant denies that plaintiff is entitled to judgment against the said defendant, The St. Louis and San Francisco Railway Company, for three hundred dollars and his reasonable attorneys' fees and the costs of this suit, according to the laws of the State of Arkansas.

Defendant, for another and further answer to the complaint of plaintiff herein, avers that the pretended law referred to in said complain as "An act to regulate the rates of charges for the carriage of passengers by railroads," and alleged to have been approved April 4th, 1887, was never passed by the legislature of the State of Arkansas, nor signed nor approved by the governor of said State in the manner required by the constitution and laws thereof.

And defendant further avers that by the constitution of the State of Arkansas as it is and was at the dates in plaintiff's petition mentioned provided that the legislature of said State should have

7 and possess the power to make and determine the rules of and for its proceedings.

That the legislature whose pretended enactment is set forth in said petition did make, determine, and publish rules for its government, and which were known as the "joint rules of the senate and house of representatives of the State of Arkansas for the session of 1887."

That by said rules it was provided as follows:

Rule 7. When a bill shall have passed both houses it shall be enrolled by the enrolling clerk of the house in which it originated.

8. All bills must be enrolled and returned to each house by the enrolling committee within three days after their passage.

9. No bill, resolution, or memorial shall be sent to the governor for his approval unless the same shall have been clearly and fairly enrolled without obliteration or interlineation.

10. When a bill is enrolled it shall be examined by a joint committee, composed of three members of each house, appointed as a standing committee for that purpose, and it shall be their duty to compare the enrolled with the engrossed bills, correct any errors they may discover, and to report the same forthwith to their respective houses.

11. After examination and report by *by* the enrolling com-

mittee each bill shall be signed, first by the speaker of the house of representatives and then by the president of the senate.

12. When a bill has been signed by the speaker of the house and president of the senate it shall be delivered to the governor by the joint committee on enrolled bills, who, through their chairman or some other member of the committee, shall report to each house the day on which such bill was delivered, which report shall be entered on the journals of the respective houses.

And the defendant further avers that the pretended enact-
8 ment aforesaid was never enrolled by the clerk of the house in the manner required by said rule seven; that said pretended act or bill was never reported to either house of representatives or the senate of said State of Arkansas within three days after its passage; that said pretended bill was not sent to the governor for his approval after the same had been clearly and fairly enrolled; that said pretended bill was never examined or compared with the engrossed bill by a joint committee of the house of representatives and senate as required by said rule ten.

That said pretended bill was never signed by the speaker of the house of representatives or the president of the senate as required by rule eleven; that said pretended bill was not delivered to the governor of said State of Arkansas by a joint committee of enrolled bills or through the chairman or any member of said committee returned to either the house of representatives or of senate of said State on the day the same was delivered or any other day as required by rule twelve, and that said pretended bill, referred to in plaintiff's complaint, as hereinbefore stated, is null, of no effect, and void.

That the certain act of the legislature was clearly and fairly enrolled without obliteration or interlineation by the enrolling clerk of the house in which it originated, in accordance with said rule 7, and was returned to each house by said committee within three days after the passage as required by rule 8 and was examined by a joint committee, composed of three members of each house, who carefully compared the enrolled with the engrossed bills as required by said rule 10, and, after examination and report by the enrolling committee, said bill was first signed by the speaker of the house of representatives and then by the president of the senate as required by rule 11; whereupon it was delivered to the governor by the
9 joint committee on enrolled bills, and, through their chairman, reported to each house the day on which said bill was delivered to the governor as aforesaid, was, without authority of law, after adjournment of the legislature, changed, altered, and amended in material matters by interlineation and by interpolating therein provisions not contained in said bill so enrolled, returned, examined, and signed and delivered to the governor as aforesaid, and that before such change, alteration, and amendment said bill as enrolled did not provide for a maximum rate of charges, and that the bill so wrongfully and illegally interlined, interpolated, changed, altered, and amended as aforesaid is the pretended law in plaintiff's complaint mentioned.

Wherefore the aforesaid pretended act of the legislature is null and — no effect and void.

III.

Defendant, for another and further answer to the complaint of plaintiff herein, avers that the stations of Fort Smith and Lancaster Sta. in said complaint mentioned are on the line of the Missouri, Arkan-as & Southern railway, for the purpose of constructing which the Missouri, Arkansas & Southern Railway Company was organized on the 16th day of August, 1880, under the general laws then in force, and which was authorized to construct a railway from the town of Fayetteville, Arkansas, thence southward to Fort Smith, in said State.

That by the statutes in said State in force at the time of the incorporation of said railway company as aforesaid it was provided that said company should have the right to regulate the time — manner in which passengers and property should be transported and the compensation to be paid therefor, not to exceed the sum of five cents per mile; and it was also further provided that while the legislature might when any such railroad should be opened for use from time to time alter or reduce the rates of tolls, fares, freight, or other profits upon such road, yet it was further provided that the same should not without the consent of the corporation be so reduced as to produce for said profits less than fifteen per cent. per annum on the capital actually paid in, nor -less on an examination of the amounts received and expended to be made by the secretary of state he should ascertain that the net income derived by the company from all sources for the year last past should have exceeded an annual income of fifteen per cent. upon the capital of the corporation actually paid in, and that until such profits did annually accrue to said company its successors and assigns were granted without limitation, restriction, or control the right to fix such rates of fares as to it should seem meet and proper.

That at such time it was also provided by the laws of said State, which have remained and are yet in force, that any two or more railroad companies in said State existing under either general or special laws and owning railroads constructed wholly or in part, which, when completed and connected, would form one continuous line of railroad, continuing and running in the same general direction, were authorized to consolidate their stock and make joint stock with any connecting railroad company, whether within or without the State, and form one company owning and controlling said continuous line of road with all the powers, rights, privileges, and immunities which belonged to or rested upon either of the companies making such consolidation; that said Missouri, Arkansas and Southern Railway Company was connected at its northern terminus with the railway of the Saint Louis, Arkansas and Texas Railway Company (of Arkansas), a corporation organized and existing under the general laws of the State of Arkansas.

That said Saint Louis, Arkansas and Texas railway was
11 connected at its northern terminus on the boundary line of the State of Missouri with the railroad of the St. Louis, Arkansas and Texas Railroad Company (of Missouri), a corporation organized under the laws of the State of Missouri and running from said southern terminus northwardly to the town of Plymouth, in the State last aforesaid.

That at said time it was also provided by the laws of the said State of Missouri which have remained and are yet in force that any two or more companies in said State existing under either general or special laws and owning railroads constructed wholly or in part which, when completed and connected, would form one continuous line of railway continuing and running in the same general direction were authorized to consolidate their stock and make joint stock with any connecting railroad company, whether within or without the State, and form one company owning and controlling said continuous line of road, with all the powers, rights, privileges, and immunities which rested upon either of the companies making such consolidation.

That on the 10th day of June, A. D. 1881, said three corporations last named consolidated their companies in the manner required by the laws of said States of Arkansas and Missouri into a corporation known as the Saint Louis, Arkansas and Texas Railway Company (consolidated).

That the railway of said last-mentioned corporation connected at the town of Plymouth, its northern terminus, with the railway of the St. Louis & San Francisco Railway Company, a corporation organized and existing under the general laws of the State of Missouri and the several acts of the Congress of the United States, and formed therewith a connecting and continuous line of railway running and continuing in the same general direction; that on and previous to the 21st day of February, 1882, it was provided by the laws of the State of Arkansas and of the State of Missouri that any rail-
12 road corporation incorporated under the *the* laws of said State of Missouri might lease or purchase any part of a railroad with all its rights, privileges, franchises, immunities, real estate, and other property, the whole or part of which was in the State of Missouri and constructed, owned, or leased by any other company, if the line or lines of the road or roads of said company were connected and continuous, and that any railroad corporation incorporated under the laws of the said State of Arkansas whose road was wholly or in part constructed and in operation was authorized to and might sell, lease, or otherwise dispose of the whole or any part of its railroad with all the rights, privileges, franchises, and immunities thereunto belonging or in anywise appertaining to any connecting railroad or any railroad corporation then or thereafter organized under the laws of said State of Missouri or of the United States or of both; that in the manner provided by the statutes of the States of Missouri and Arkansas said St. Louis, Arkansas & Texas Railway Company, consolidated, did, on the 21st day of February, 1882, convey, by good and sufficient deed, to the

St. Louis & San Francisco Railway Company all of its railway in said States of Arkansas and Missouri, together with all the rights, privileges, franchises, and immunities thereunto belonging or appertaining. The said St. Louis, Arkansas & Texas Railway Company (consolidated) and said Missouri, Arkansas & Southen Railway Company have at all times promptly and at the times required by law complied with the law requiring them to make an annual report to the secretary of state in the manner and at the time prescribed by law, and at all times complied and fulfiled the conditions and terms of their respective charters; and defendant avers that by the statutes of said State in force at the time said State of Arkansas did enter into a contract with said Mis-
13 souri, Arkansas and Southern Railway Company, by which the said State granted to said railroad company, its successors and assigns, the privileges and franchise of making and fixing reasonable rates of fares for the transportation of passengers, and did at that time contract with said company that it should have the right, privilege, and immunity of fixing fares and charging tolls for the transportation of passengers at such sums as would enable it to realize a profit of not less than fifteen per cent. per annum on its capital actually paid in; that by the laws of said State in force as aforesaid it was also provided that any company with which said Missouri, Arkansas and Southern Railway Company might consolidate should possess all the franchises, powers, rights, and privileges possessed at the time of such consolidation by said last named company; that by reason and force thereof said St. Louis, Arkansas and Texas Railway Company (consolidated) acquired and possessed the same rights, powers, privileges, and franchises which belonged or appertained to said Missouri, Arkansas & Southern Railway Company; that at the time of such consolidation said Missouri, Arkansas & Southern railway had not yet been completed; that the line proposed and which was afterwards constructed was laid out and surveyed through a mountainous and almost wholly uninhabited country; that the expense of constructing the same promised to be very large and the probable business which said road would receive for a large number of years would not justify the expenditure; that said railway company was without means, as was also said St. Louis, Arkansas & Texas Railway Company (consolidated), to construct and complete the proposed line of railway on which the stations in plaintiff's complaint mentioned are situated; that, relying upon the faith of the contract and agreement of said State of Arkansas with said railroad company aforesaid that no regulation of its right to charge rates, fares, or freights would be exercised until the net profits upon the capital actually paid in to construct the line of
14 railroad did exceed fifteen per cent., said St. Louis & San Francisco Railway Company did purchase of said St. Louis, Arkansas & Texas Railway Company (consolidated) aforesaid its line of railway and did assume all of its debts and obligations in express consideration of obtaining the right and priviledge to exercise the franchise of fixing its own rates of fares and tolls until the same

should equal a profit of fifteen per cent. on the capital actually paid in; that, relying upon the faith on the contract aforesaid of said State with said companies, numerous parties were induced to and did buy the bonds of said St. Louis & San Francisco Railway Company secured upon the railway of the said Missouri, Arkansas & Southern Railway Company and the franchises, privileges, and immunities thereto appertaining; that said railway, although completed for about five years, has never at any time earned an amount equal to three per cent. on the capital actually paid in; that the earnings of said railroad and for the next ensuing two years will not exceed three per cent. on the capital actually paid in, and that if defendant is required to charge no more than three cents per mile on said line of railway its net earnings will be so reduced that no profit whatever will inure to the owners thereof; and the defendant avers that the corporation of the Missouri, Arkansas & Southern Railway Company, the consolidation of the railroads, as aforesaid, and the sale of the consolidated railroad to the defendant, as well as the mortgaging thereof by the defendant company, were each and all contracts made and entered into upon the faith that the contracts of the State of Arkansas with said several companies would not be broken; wherefore defendant avers that the pretended law in plaintiff's complaint mentioned is in violation of the laws and constitution of the State of Arkansas, impairs the obligations of the several contracts entered into upon the faith thereof as aforesaid, in violation of section ten, article one, of the Constitution of the United States, and is null and void.

IV.

Defendant, for another and further answer to the complaint of plaintiff herein, avers that the Missouri, Arkansas and Southern Railway Company, hereinbefore in the third count of this answer mentioned, was incorporated under the general laws of the State of Arkansas in force at the date thereof; that subsequently, to wit, in the manner required by the laws of the State then in force, it did, on the 10th day of June, 1881, enter into articles of consolidation with the St. Louis, Arkansas & Texas Railway Company (of Missouri) and the St. Louis, Arkansas & Texas Railway Company (of Arkansas) whereby it did make joint stock with said companies forming the St. Louis, Arkansas & Texas Railway Company (consolidated); that subsequently thereto said consolidated railway company did, in the manner required by the law in force at that time, sell and convey its railway franchises, privileges, and immunities thereto appertaining to this defendant; and defendant avers that the general laws of said State in force at the several dates last hereinbefore mentioned formed the charter of the said Missouri, Arkansas & Southern Railway Company and said St. Louis, Arkansas & Texas Railway Company (consolidated), to which the defendant company has succeeded, and under which and an act of the Congress of the United States entitled "An act to authorize the construction of a bridge across the Arkansas river at Van

Buren, Crawford county, Arkansas," approved July 3rd, 1882, it is authorized to and does now operate and maintain said line; and defendant avers that by section six (6), article twelve (12), of the constitution of the said State of Arkansas, in force at the several dates hereinbefore mentioned, it was provided that no charter of any corporation should be altered, revoked, annulled, or repealed in such a manner as
16 to do injustice to the incorporators. Defendant avers that if said rates of fares in plaintiff's complaint mentioned are established as a maximum beyond which this defendant cannot charge it will not be able to earn a sum sufficient to pay a reasonable rate of interest on its fixed indebtedness actually incurred in constructing said railway; that the railway on which the stations in plaintiff's complaint mentioned are situated is one which was highly expensive to construct and is highly expensive to maintain; that the actual cost of transporting passengers over said division and the maintenance of the road in condition exceeds the price fixed as a maximum by the pretended law aforesaid, to wit, the sum of three cents per mile. Wherefore defendant says that said pretended act is unreasonable and does this defendant and the incorporators of said Missouri, Arkansas & Southern Railway Company, which constructed said line of railway, and their successors who succeeded to their rights and privileges a material injustice, and is, therefore, in violation of said constitution of Arkansas and null and void.

V.

Defendant, for another and further answer to the complaint of plaintiff herein, avers that the line of railway aforesaid in plaintiff's complaint mentioned on which the stations therein described are located was constructed through a mountainous country which necessitated the expenditure of large sums of money and which were much in excess of the usual and ordinary cost per mile of railway construction; that the grades upon the same are extraordinarily heavy, and that many cuts and fills, embankments, bridges, trestles and tunnels are situated thereon, for the maintenance of which large sums are required and demanded; that the actual cost of conducting the transportation of passengers over said railway exceeds the sum of three cents per mile; that the charge of five cents per mile for carrying a passenger over each and every mile of railway
17 hereinbefore in this answer described is a reasonable fare and just charge, and that such sum is not an excessive charge for transporting passengers; that the charge of five cents per mile not being excessive and the charge of three cents per mile being unreasonable and unjust, said pretended law is illegal and void.

VI.

Defendant, for another and further answer to the complaint of plaintiff herein, avers that said pretended act discriminates between railroads of the same class in this, that railroads of seventy-five miles or less in length owned by separate corporations and not operated

by corporations which own other lines of railroad are permitted under the provisions thereof to charge the sum of five cents per mile, while railroads of the same length and same class which may be operated or controlled by corporations owning other lines of railway within the State are limited to a maximum of three cents per mile for the same class of service upon the same class of roads. Wherefore defendant avers that said pretended law is special legislation and makes arbitrary discrimination between different roads of the same class and is therefore in conflict with and in violation of article II of the constitution of the State of Arkansas and is a denial to defendant of the equal protection of the law, contrary to the provisions of section 1 of the 14th amendment to the Constitution of the United States.

VII.

Defendant, for another and further answer to the complaint of plaintiff herein, avers that the line of railroad therein described is and was at the dates therein mentioned by the acts of the Congress of the United States declared to be a post and military route and national public highway of the United States for postal, mili-
18 tary, and all other Government services and subject only to such regulations as the Congress of the United States may impose as to the rates of freights and fares to be charged for carrying persons and property thereon, and that the right to fix the rates of fares and tolls which shall be charged thereon has been expressly reserved by the Congress of the United States to itself and any interference or attempted regulation thereof by the legislature of the State of Arkansas is unwarranted and illegal, and that by reason thereof said pretended act in plaintiff's complaint mentioned is null and void as to this defendant.

VIII.

Defendant, further answering, says that the continuity of the defendant's railway between the stations of Fort Smith and Lancaster Sta. is broken by the Arkansas river, across which has been constructed a railroad bridge with the approaches thereto, connecting on either side with the tracks of the defendant's railway and forming therewith a continuous line of railway running from Fayetteville to Fort Smith, both in the State of Arkansas; that said bridge was constructed and caused to be constructed, under the provisions and authority of an act of the Congress of the United States entitled "An act to authorize the construction of a bridge across the Arkansas river at the town of Van Buren, Crawford county, Arkansas," approved July 3rd, 1882, by the defendant company; that by the provisions of said act there was expressly reserved to the defendant company or the Secretary of War of the United States the sole and exclusive right to fix and control the rates of fares and tolls which should be charged upon said bridge and for carrying or transporting freight or passengers thereover; that the defendant company and the Secretary of War *has* heretofore and before

the dates in plaintiff's camplaint mentioned had fixed, published, and announced a tariff of rates which should be charged for carrying or transporting freight or passengers over said bridge, and that
19 by such tariff the price and sum of forty cents was fixed as the rate which should be charged solely for carrying each passenger over said bridge and the approaches thereto belonging, and that such tariff was at the several dates mentioned in plaintiff's complaint and is still in force; that of the amount charged plaintiff forty cents thereof was solely for carrying him across said bridge and the approaches thereto belonging, and such charge was duly authorized by said act of Congress of the United States of America hereinbefore mentioned, and any of the legislation of the State of Arkansas conflicting with said act of Congress is null and void and of no effect. Wherefore defendant prays that it be discharged and have judgment for the costs herein laid out and expended.

IX.

And, for another and further answer to the complaint of plaintiff herein, defendant avers that by the laws of said State of Arkansas in force at the time of the consolidation in the third count of this answer fully set forth, reference to which is now made as though fully set out in this count, it was provided that after the consolidation or sale of any line of railway to any connecting line there should remain and appertain to said line so consolidated all the rights, privileges, franchises and immunities, liabilities and obligations which appertained or belonged to said company before such consolidation, and that its condition for all purposes should remain the same as if no such consolidation had been affected; that said Missouri, Arkansas and Southern Railway Company is less than seventy-five miles in length; and defendant avers that such being the case and the said stations in plaintiff's petition mentioned being upon a line of railway less than seventy-five miles in length, the said defendant railway company had the right to charge thereon a sum not exceeding five cents per mile.

20 X.

Defendant, for another and further answer to the complaint of plaintiff herein, says that if the plaintiff was carried by defendant, as in his complaint mentioned, it was in pursuance of an agreement and understanding between himself and his attorneys herein that he should be carried for the sole purpose of imposing upon said railway company the penalty which is provided by said pretended enactment of the legislature of the State of Arkansas, and that any sum which he might recover herein is, under the agreement aforesaid, to be divided between himself and his attorneys herein; and defendant avers that said plaintiff was induced and encouraged to said action by such attorneys for the purpose aforesaid, and that said plaintiff herein was not a passenger for ordinary purposes, but for the sole purpose aforesaid and no other. Wherefor defendant says that the action herein sought to be maintained

opposed to public policy and, being champertous, the plaintiff should not be allowed to recover.

XI.

Defendant, for another and separate answer to the complaint of plaintiff herein, says that any sum which the plaintiff herein may have paid the defendant company for any services rendered by it in the carriage and transportation of the property and the carriage and transportation of the plaintiff as a passenger or otherwise was voluntarily paid, without protest or objection on the part of the plaintiff. Wherefore defendant says that the plaintiff should not, upon the facts in his complaint, be allowed to recover herein. Wherefore defendant having fully answered, prays to be hence dismissed, with all his cost in its behalf laid out and expended.

JOHN O'DAY & CLAYTON & BRIZZOLARA,
Att'ys for Defendant.

21 STATE OF ARKANSAS,)
County of Sebastian.)

I, James Brizzolara, do solemnly swear that I am one of the attorneys — Saint Louis and San Francisco Railway Company, and that the statements contained and set forth in the foregoing answer are true, as I verily believe.

—— ——.

Sworn to and subscribed before me this — day of —, A. D. 18—.
—— ——, *Clerk.*

(Endorsed:) Filed May 10th, 1888. J. C. Stalcup, clerk.

Summons to Answer.

(Copy of pl'ff's dem. to answer.)

(Caption omitted.)

Now comes the plaintiff herein and demurs to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, & 11th paragraphs of the amended answer of the defendant herein, and for cause says that said abovementioned paragraphs, nor either of them, state facts sufficient to constitute a defense to said action.

FREDERICK, MARMAM & FREDERICK,
Att'ys for Pl'ffs.

(Endorsed:) Filed May 10th, 1888. J. C. Stalcup, clerk.

Judgment on Demurrer.

MAY 15*th*, 1888.

Caption omitted.

And now comes plaintiff, by attorneys, Marmam & Frederick, and defendant, by Clayton, Brizzolara and Forrester, and defendant filed an amended answer herein; and thereupon plaintiff filed a

demurrer to 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 paragraphs of said amended answer, which was by the court sustained and the
22 said paragraphs stricken out, and defendant excepted at the time; and thereupon, a jury being waived, this cause was by the court submitted to the court, sitting as a jury; and when the court had heard all the evidence adduced, agreed statement of facts filed herein, and agreement of counsel, and being well and sufficiently advised in the premises, doth find for the plaintiff in the sum of $75.00, and $10 for his attorneys' fees.

Verdict & Judgment.

It is therefore considered by the court that the plaintiff recover of and from said defendant said sum of $75.00 damages and $10 att'ys' fees and all his costs herein expended.

This judg't having been made on 10th inst., and not entered of record, same is entered now for then.

(*Copy of Demurrer.*)

(Caption omitted.)

Now comes the plaintiff herein and demurs to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th paragraphs of the amended answer of the defendant herein, and for cause says that said above-mentioned paragraphs, nor either of them, state facts sufficient to constitute a defense to said action.

FREDERICK, MARMAN & FREDERICK,
Att'ys for Pl'ffs.

(Endorsed:) Filed May 10th, 1888. J. C. Stalcup, clerk, by W. K. Stalcup, D. C.

Judgment on Motion for New Trial.

(Caption omitted.)

AUGUST 7*th*, 1888.

On this day, it being represented to the court that the defendant's motion for a new trial was filed, and overruled by the court, and defendant's exceptions thereto duly noted, and an appeal prayed and granted to the Supreme Court herein on the 10th day of May, 1888, and defendant allowed 60 days to file bill of exceptions in this cause, all of which were noted on the judge's docket
23 but not entered of record, the same is, by consent, entered now for then.

Copy of Bill of Exceptions.

Caption omitted.

Bill of exceptions.

Be it remembered in the above-entitled cause the following among other proceedings were had at and during the regular April, 1888, term thereof:

On the 10th day of May, A. D. 1888, plaintiff filed his demurrer to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th paragraphs of defendant's answer; which demurrer was in words and figures as follows (see page 32).

Which demurrer was argued and, after being by the court considered, was sustained as to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, & 11th paragraphs in said answer, except paragraph one, the 10th paragraph being stricken out by consent, and said paragraphs 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, and 11th of said defendant's answer were stricken out by the court; to which ruling and order of the court in sustaining the demurrer and striking out each and all of the paragraphs aforesaid in said answer except paragraph one defendant then and there at the time excepted.

That on the trial of this cause in said court, on the 10th day of May, 1888, at the April term thereof, the said cause was submitted, by agreement of counsel, to the court sitting as a jury, upon the following agreed statement of facts, to wit:

That the plaintiff applied to the agent of the defendant at the station mentioned in the complaint for a ticket as set forth in the complaint; that the agent demanded and received as fare the sum mentioned in the complaint; that the distance upon the defendant's line of railway between the points mentioned in the complaint is as set out in the complaint; that the stations mentioned in the complaint are stations of and situate upon the de-
24 fendant's railway; that the entire line of defendant's railways in the State of Arkansas is more than seventy miles in length.

That the defendant is a corporation duly organized under the laws of the State of Missouri, and not of Arkansas, and chartered under an act of Congress; that the allegations in par. 3 of defendant's answer as to the organization, consolidation, and sale of railways are true; that the defendant, believing that the act was unconstitutional and was void, continued to charge its usual fare per mile until the supreme court of the State of Arkansas decided the law to be valid and of force, when it lowered its rates in conformity with the provisions of the act of 1887, fixing the rates of passenger fare at 3 cents per mile.

That all paragraphs of answer except paragraph one being stricken out on demurrer, this statement of facts applies only to paragraph one; which aforesaid agreed statement of facts was entered into by counsel after defendant had produced competent witnesses and by

them offered to prove to the court, in support of the issues raised by the 1st prragraph of the defendant's answer, a demurrer having been sustained to all the other paragraphs of the said answer, that—

First. That the actual cost of the defendant's railway and each of the consolidating lines which it purchased was over fifty thousand dollars a mile.

Second. That the actual amount of the capital stock of each of the roads in question was as follows:

St. Louis and San Francisco Railway Company	$40,000.00 per mile
St. Louis, Ark. and Texas Railway Co., consolidated	$40,000.00 per mile
The St. Louis, Arkansas and Texas R'y Co. of Missouri	$40,000.00 per mile
St. Louis, Arkansas and Texas R'y Co. of Arkansas	$40,000.00 per mile

And all of which consisted in cash actually paid into the treasury of the said railway companies.

24½ Third. That in addition to said money so paid into the treasury of said railway companies, said railways were mortgaged for large amounts, to wit, the sum of more than $500,000 to the *bona fide* holders of their bonds secured thereby on which it was required to pay annually large sums of money, and which sums of money so borrowed, secured by mortgages aforesaid, had been used in addition to the capital stock of said company in the actual construction thereof.

Fourth. The actual gross earnings of the said Missouri, Arkansas & Texas Railway, consolidated, and the defendant's line never exceeding and for the next three years cannot exceed the sum of three thousand dollars per mile per annum.

Fifth. That of such earnings it has and must in the future of necessity expend and actually pay out in cash the sum $2,400 per mile per annum for the maintenance of its trains and railway and taxes thereon.

That the actual cost of carrying passengers over the line of railroad in the plaintiff's complaint mentioned, the actual cost of carrying plaintiff at the time and in the manner in his complaint described, was three and one-half cents per mile for each mile, which said passenger was carried — so much of said railway as was not included in the bridge at Van Buren or the approaches thereto, and that the actual cost of carrying passengers across said bridge at Van Buren was forty cents for each passenger carried thereover; that the actual cost incurred by defendant in carrying the plaintiff from Fort Smith to Lancaster and return was one dollar and thirty-three cents, and the difference between the cost of carrying such passenger, to wit, 3½ cents per mile, and the bridge charge, and the amount which was actually charged, to wit, 5 cents

per mile, would not yield the defendant 3 per cent. on the actual paid-in capital stock of any of the consolidated companies as in the answer set forth.

Sixth. That the length of the Missouri, Arkansas & Southern railway was 64 miles.

25 Seventh. That the continuity of the defendant's railway is broken by the Arkansas river, across which defendant had constructed and caused to be constructed a bridge which, with the approaches thereto, connect with defendant's railway, forming therewith a continuous line, and being the one over which plaintiff was carried; that such bridge was constructed by defendant under the authority of an act of Congress of the United States, entitled An act to authorize the construction of a bridge across the Arkansas river at Van Buren, in Crawford county, approved July 3rd, 1882; that passengers being transported over defendant's railway between the stations of Fort Smith and Lancaster were required to and must have been carried over said bridge; that by the provisions of said act there was reserved to the Secretary of the War of the United States the right to fix the rates of tolls that should be charged for passengers carried over said bridge; that of the sum charged plaintiff for carrying him between the stations of Fort Smith and Lancaster forty cents was charged for carrying him over said bridge and approaches thereto, which sum so charged had been previously fixed by the defendant and also by the Secretary of War as the sum to be charged each person carried by defendant over said bridge; that the sum so charged plaintiff for carrying plaintiff over said bridge had long prior thereto been fixed by it and the Secretary of War as the rate to be charged for carrying passengers over said bridge and is still in force; and said defendant offered to prove by said witnesses in support of said first paragraph of its answer each and every fact set forth and alleged in the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, & 11th paragraphs of said defendant's answer. Upon the offering of such proof, and each and every part and portion of the same, plaintiff objected to admission of such testimony as incompetent and irrelevant, which objection was sustained by the court, and each

26 and every part thereof excluded; to which ruling of the court in excluding said evidence and each and every part and portion thereof the defendant at the time then and there excepted; whereupon, saving its exceptions to the said ruling of the court in excluding said evidence and not waiving the same, the said defendant and plaintiff entered into the agreement of the aforesaid agreed statement of facts.

The above, together with the aforesaid agreed statement of facts, was all the evidence offered by either party; whereupon the court found a verdict for the said plaintiff. Whereupon the said defendant, at the said term of said court, on the 10th day of May, A. D. 1888, filed a motion for a new trial in words and figures following, to wit:

Motion for New Trial.

(Caption omitted.)

Comes the defendant herein and moves the court to grant it a new trial and set aside the judgment rendered in the above-entitled cause, and for reasons thereof assigns the following:

First. Because the said court erred in sustaining plaintiff's demurrer to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, & 11th paragraphs of defendant's answer and striking the same from the answer on said demurrer.

Second. Because the court erred in excluing proper, competent, and relevant testimony material to the issues in the cause offered by defendant.

Third. Because the court erred in refusing to allow defendant to introduce competent and relevant testimony material to the cause.

Fourth. Because the findings and verdict of the court is contrary to the evidence and not sustained by sufficient evidence.

Fifth. Because the findings, verdict, and decision of the court are contrary to law.

CLAYTON, BRIZZOLARA & FORRESTER,
Att'ys for Defendant.

27 (Endorsed:) Filed in open court May 10th, 1888. J. C. Stalcup, clerk, by W. K. Stalcup, D. C.

Which said motion afterwards, on the 10th day of May, 1888, came on for hearing, whereupon the court overruled the same; to which ruling of the court the said defendant at the time then and there excepted and prayed the court that its exceptions might be allowed, and that it have 60 days wherein to file its bill of exceptions, and prayed an appeal to the supreme court of the State of Arkansas, which was done, and this its bill of exceptions was signed and sealed on the 9th day of July, 1888, and made a part of the record.

JOHN S. LITTLE,
Judge of the 12th Judicial, Ark's.

(Endorsed:) Filed July 10th, 1888. J. C. Stalcup, clerk, by W. K. Stalcup, D. C.

Cost Bill.

Clerk circuit court, Stalcup	$7 25
Sheriff	90
Transcript	12 50
	$20 65
Contra. Paid by def't (clerk's cost)	4 50
" " (transcript)	12 50
Total	$17 00

28 *Certificate to Transcript.*

STATE OF ARKANSAS, }
County of Sebastian, Fort Smith District. }

In testimony that the foregoing transcript of pages is truly taken and copied from the record and papers in above-styled cause as appears of record in my office, I, J. C. Stalcup, clerk of the circuit court in and for said county, hereby sign my name *and* as such clerk and affix the seal of said court, at my office, on this the 7th day of August, 1888.

[L. S.]

J. C. STALCUP, *Clerk*,
By W. K. STALCUP, *D. C.*

(Endorsed:) Transcript. Filed Aug. 9th, 1888. W. P. Campbell, clerk.

29 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered that at a term of the supreme court of the State of Arkansas, begun and held at the court-house, in the city of Little Rock, on the 27th day, being the fourth Monday, of May, A. D. 1889, amongst others, were the following proceedings, to wit, on the 10th day of February, 1889, a day of said term:

Submission.

ST. LOUIS & SAN FRANCISCO R'Y CO., Appellant, *vs.* ——— ———, Appellee.	Appeal from Sebastian Circuit Court.

Come the appellant and appellee, by their respective attorneys, and this cause is submitted upon the abstracts and briefs filed in No. 858, and by the court taken under advisement.

Judgment of the Supreme Court.

ST. LOUIS & SAN FRANCISCO R'Y CO., Appellant, *vs.* A. H. CARTER, Appellee.	Appeal from Sebastian Circuit Court.

Judgment.

This cause came on to be heard upon the transcript of the record of the circuit court of Sebastian county, and was argued by counsel. On consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is, therefore, considered by the court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

And it appearing to the court that said appellant, with James H. Mershon and M. Joel as sureties, has filed a supersedeas bond in this cause, it is further considered that said appellee recover of said appellant and said James H. Mershon and M. Joel the sum of eighty-five dollars, with interest at 6 per cent. per annum from
30 the 15th day of May, A. D. 1888, and the further sum of eight dollars and fifty cents, being ten per cent. interest thereon, and costs.

It is further considered that said appellee recover of said appellant and said sureties all his costs in this court and the court below in this cause expended and have execution thereof as well as of said judgment.

31 In the Supreme Court of the State of Arkansas

St. Louis & San Francisco R'y, Appellant, *vs.* A. H. Carter, Appellee.	Application for Allowance of Writ of Error.

To the Hon. S. R. Cockrill, chief justice of the supreme court of Arkansas:

Comes the St. Louis and San Francisco R'y Co., by its attorneys, Clayton, Brizzolara & Forrester, and complains that in the records and proceedings, and also in the rendition of a judgment in a suit between A. H. Carter and St. Louis and San Francisco R'y Co., defendant, in the supreme court of the State of Arkansas, being the highest court of law or equity in said State in which a decision could be rendered in said suit, and in which a final judgment was rendered against it, the aforesaid defendant, on the 3rd day of January, A. D. 1891, who was the appellant in said proceedings, wherein was drawn in question the construction and validity of section 10, art. 1st, and the 5th and 14th amendments of the Constitution of the United States of America and the statutes of the United States, and the decision was against the title, rights, privileges, and franchises specially set up, based upon, claimed, and founded upon the construction and validity of the aforesaid sections, articles, and amendments of the Constitution of — United States of America and the aforesaid statutes of the United States—all of which appears in the record, pleadings, and proceedings in said suit—manifest error hath happened, to the great damage of the St. Louis and San Francisco R'y Co.:

Wherefore they pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

CLAYTON, BRIZZOLARA & FORRESTER,
Attorneys.

Little Rock, Ark., *Jan'y 17th*, 1891.

Allowed.

S. R. COCKRILL,
Chief Justice.

32 In the Supreme Court of the State of Arkansas.

ST. LOUIS & SAN FRANCISCO R'Y, Appellant,
vs.
A. H. CARTER, Appellee. } Bond.

Know all men by these presents that we, James Brizzolara & Henry M. Cooper, are held and firmly bound unto A. H. Carter, in the full and just sum of two hundred and fifty dollars, to be paid to the said A. H. Carter, his executors, administrators, or assigns; to which payment, well and truly to be *named*, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 17th day of January, A. D. 1891.

Whereas lately, at a session of the supreme court of the State of Arkansas, in a suit pending in said court between A. H. Carter, plaintiff, and The St. Louis and San Francisco R'y Co., defendant, judgment was rendered against the said defendant, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit and a citation directed to the said A. H. Carter, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday in October next:

Now, therefore, the condition of the above obligation is such that if the said St. Louis and San Francisco R'y shall prosecute its said writ of error to effect and answer all damages and costs — it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

JAMES BRIZZOLARA. [SEAL.]
HENRY M. COOPER. [SEAL.]

Approved:
S. R. COCKRILL, *C. J. Arks.*

33 THE STATE OF ARKANSAS:

In the Supreme Court.

I, William P. Campbell, clerk of the supreme court of the State of Arkansas, hereby certify that the foregoing 32 pages contain a full, true, and complete transcript of the record and proceedings in said court in the cause therein stated, except the briefs of counsel.

In testimony whereof I hereto set my hand as clerk and affix the seal of said court at my office, in the city of Little Rock, this 15th day of April, A. D. 1891.

Seal of the Supreme Court of Arkansas.

W. P. CAMPBELL, *Clerk.*

Endorsed on cover: Case No. 14,653. Arkansas supreme court. No. 176. The St. Louis & San Francisco Railway Company, plaintiff in error, *vs.* A. H. Carter. Filed May 18, 1891.

Office Supreme Court, U. S.
FILED
NOV 22 1894
JAMES H. McKENNEY,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

173.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN B. GILL, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

GEORGE R. PECK,
EDWARD D. KENNA,
A. T. BRITTON and
A. B. BROWNE,
ATTORNEYS FOR PLAINTIFF IN ERROR.

THE GUNTHORP-WARREN PRINTING COMPANY, 53 DEARBORN ST., CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

173.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN B. GILL, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

STATEMENT.

The Action.

By an act of the Legislature of Arkansas, approved April 14, 1887, the maximum rate of passenger fares to be charged in that state was fixed at three cents per mile, and a penalty of $300 given the passenger for each overcharge.

This is an action to recover five penalties alleged to be due under the act of 1887.

The plaintiff's petition sets forth that he made five separate trips over the defendant's line of railway in the State of Arkansas, the longest of said trips being eleven miles in length, and that the defendant unlawfully charged him at the rate of five cents per mile instead of at the rate of three cents per mile as provided by the act of 1887.

The Answer.

The defendant in the first count of its answer denied generally the allegations in plaintiff's petition and in other counts set forth that the alleged act had not been passed in the manner fixed by the Con-

stitution of Arkansas; that the plaintiff was not a passenger for either business or pleasure, but traveling solely for the purpose of putting himself in a position to sue the defendant, and that he voluntarily paid the amount demanded of him. Each and all of these special defenses were subsequently held to be insufficient by the Supreme Court of Arkansas, and plaintiff in error therefore omits further reference to so much of the record as refers to such counts of its answer, and will confine its statement to the federal questions presented by the record.

The *third count* of defendant's answer states that the three stations from and to which the plaintiff took passage, were located on the St. Louis, Arkansas and Texas Railway (of Arkansas), which was built by the St. Louis, Arkansas and Texas Railway Company (of Arkansas), a corporation organized April 16, 1880, under the general laws of that state, and authorized to construct a line about thirty-seven miles in length, extending from the Missouri line to Fayetteville; that by the laws of Arkansas, in force at the time of its incorporation, it was provided that said company should have the right to regulate the time and manner in which passengers and property should be transported and the tolls and compensation to be paid therefor, not to exceed the sum of five cents per mile; and it was also further provided that while the legislature might when any such railroad should be opened for use from time to time alter or reduce the rates of tolls, fares, freights, or other profits upon such road, yet it was further provided that the same should not, without the consent of the corporation, be so reduced as to produce for said profits less than fifteen per cent. per annum on the capital actually paid in, nor unless on an examination of the amounts received and expended to be made by the Secretary of State he should ascertain that the net income derived by the company from all sources for the year last past should have exceeded an annual income of fifteen per cent. upon the capital of the corporation actually paid in, and that until such profits did annually accrue to said company, *its* successors and assigns were granted without limitation, restriction or control the right to fix such rates of fares as to it should seem proper.

It is further stated in said count that the line of railway last named connected at said Missouri boundary line with the St. Louis, Arkansas and Texas Railway Company (of Missouri), a corporation organized under the laws of the state last named, and owning a line of railroad extending from such boundary line to the town of Plymouth in Missouri, and that said St. Louis, Arkansas and Texas Railway Company (of Arkansas), connected at Fayetteville, its southern terminus, with the railroad of the Missouri, Arkansas and

Southern Railroad Company, a corporation also organized under the general laws of the State of Arksansas and extending from said town of Fayetteville to Fort Smith, Arkansas; that under the general laws of the States of Missouri and Arkansas the three corporations last named consolidated their lines and formed the St. Louis, Arkansas and Texas Railway Company (Consolidated), which consolidated line of railroad extended from Plymouth, in Missouri, to Fort Smith, in Arkansas (and was about 154 miles in length); that after such consolidation the consolidated company, as it was authorized to do, sold its entire line of railway to the defendant, a Missouri corporation having a line of railway which connected with said consolidated line, at Plymouth, Missouri, and that by reason of the aforesaid law and contracts of consolidation and sale, there passed to the defendant the right to make and fix reasonable rates and fares for the transportation of passengers until such time as the defendant might be enabled to earn fifteen per cent. upon the capital invested in the construction of said line.

The third count further states that said railway, although completed for about five years, had never at any time, earned three per cent. upon the capital actually paid in by the company which constructed the line; that the earnings to be anticipated for the ensuing two years would not exceed three per cent. on said capital, *and that if it was required to charge no more than three cents per mile on said line of railway, its earnings would be so reduced that no profit whatever would come to the owners thereof;* and that by reason of the foregoing said act of the Arkansas Legislature impaired the obligation of the contract entered into by said state with said railway company and was therefore in violation of section 10, article 1, Constitution of the United States.

The *fourth count* of defendant's answer sets fourth the facts stated in the third count, and in addition thereto avers that by section 6, article 12, of the constitution of said State of Arkansas, in force at the several times therein mentioned, it was provided that no charter of any corporation should be altered, revoked, annulled or repealed in such manner as to do injustice to the corporation; that the present owners of the capital stock of the defendant company are the same and identical persons who incorporated and owned the entire capital stock of said St. Louis, Arkansas and Texas Railway Company (of Arkansas); that if said rates of fare in plaintiff's petition mentioned are established as a maximum beyond which the defendant cannot charge it will not be able to earn a sum sufficient to pay a reasonable rate of interest on its fixed indebtedness actually incurred in constructing said railway; that the railway on which the stations, in plaintiff's petition mentioned, are situated is one which

was highly expensive to construct and is highly expensive to maintain; *that the actual cost of transporting passengers over said division and the maintenance of the road exceeds the maximum fixed by the act of 1887*; that the line of railway in plaintiff's petition mentioned was constructed through a mountainous country requiring many expensive grades, cuts, fills, embankments, bridges, trestles and tunnels; that the charge of five cents per mile for carrying a passenger over each and every mile of railway in this answer described is a reasonable and just charge, and that the charge of three cents per mile being unreasonable and unjust said law authorizes the taking of private property for public use without just compensation and without due process of law, and is in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

There are other counts in the answer, but the two counts referred to present the only questions which will be urged in the argument.

The trial.

The defendant demurred to all the counts in the plaintiff's petition, except the first (the general denial); defendant's demurrer was overruled, and the case was heard before the court without a jury, upon an agreed statement of facts which admitted that defendant had charged and demanded fare of the plaintiff at the rate of five cents per mile, and that such rate was paid.

The defendant offered to prove each and all of the facts set forth in the third and fourth counts of its answer (see pages 60 to 62 of the record), and for such purpose produced the vice president, chief engineer, general superintendent, general passenger and freight agent and auditor of its company, and numerous expert witnesses who were traffic managers and general freight and passenger agents of other and different corporations having no interest in the defendant company, and specifically offered to prove, in addition to other facts, the following:

(*a.*) That if defendant was not permitted to charge a larger or higher maximum rate for the transportation of passengers than three cents per mile, its earnings from all sources, of every name and nature, character or kind, would not be sufficient to pay the expenses actually incurred in the operation of said railroad and the taxes thereon. (p. 62.)

(*b.*) That the business which it was reasonable to expect could be done by said company for the ensuing several years would not be sufficient to enable it to earn, in profits, an amount equal to one per cent. on the actual cost of the railway. (p. 62.)

(c.) *That the actual cost of carrying each passenger over that portion of defendant's railway in plaintiff's petition mentioned, and over all its railway therein referred to, did, and does now, exceed the sum of three cents per mile for each and every passenger so carried in the manner known as first-class passage.* (p. 62.)

(d.) *That at the times in plaintiff's petition mentioned, the defendant could not actually perform the service of carrying the plaintiff or any other passenger over its railway for the sum of three cents per mile, but that the sum in cash which it was actually required to expend in the carriage of such plaintiff* and other passengers *was equal to three and three-tenths cents for each and every mile such passenger was carried*, and that if defendant was required to perform the service at the rate of three cents per mile, it would also be required to expend more money in cash for the performance of such service than it would receive from the passenger, *and that the revenue or income which it would receive from all sources of profit other than from passenger traffic would not be sufficient to enable it to make good the amount which it would lose on its passenger business.* (p. 62.)

(e.) That three cents per mile for the service rendered by defendant in carrying passengers, at the times in plaintiff's petition mentioned, over the line of railroad therein described was not reasonable compensation, and that no less than five cents per mile would be a reasonable sum or one which would be just to the defendant. (Rec., 62, 63.)

The plaintiff objected to the proof offered as above, and the objections were sustained, to which defendant excepted.

Defendant also offered the chief engineer of the road during its construction, as a witness, and offered to prove by him that the road was an unusually expensive one, required many high and expensive approaches, viaducts, trestles and tunnels, and large expenditures for masonry and rock excavation (Rec., 64), and also offered to prove by witnesses that defendant had never at any time since the construction or completion of said lines of railway, been able to earn from all its sources of revenue, an amount which, after paying for the actual cash expenditures necessary for the operation of its road, would yield a profit equal to one per cent. upon the actual cash cost of said road, which amounted to over $40,000 for every mile of railway constructed. (Rec., 62.) To this evidence plaintiff also objected; its objections were sustained, and defendant excepted.

There was judgment for the plaintiff, from which defendant in due time appealed to the Supreme Court of Arkansas, where the judgment of the lower court was affirmed, and thereupon defendant brought its appeal by petition in error, to this court.

SPECIFICATION OF ERRORS.

First. The court erred in sustaining plaintiff's demurrer to the third count of defendant's answer. (Pp. 9 to 13, and 58 of transcript.)

Second. The court erred in sustaining plaintiff's demurrer to the fourth count of defendant's answer. (Pp. 13 and 58.)

Third. The court erred in refusing to allow the defendant to prove:

(*a.*) That if defendant was not permitted to charge a larger or higher rate for the transportation of passengers than three cents per mile, its earnings from all sources of every name, nature, character or kind, would not be sufficient to pay the expenses actually incurred in the operation of its railroad and the taxes thereon. (Page 62.)

(*b.*) That the business which defendant could be expected to do for years would not be sufficient to enable it to earn an amount equal to one per cent. on the actual cost of its railroad. (P. 62.)

(*c.*) That the actual cost of carrying each passenger over that portion of defendant's railway mentioned in plaintiff's petition and over all of its railway referred to in said petition exceeded the sum of three cents per mile. (P. 62).

(*d.*) That the actual sum which defendant was required to expend in cash in carrying the plaintiff and every other passenger upon the line of railway described in the petition was equal to three and three-tenths cents for each and every mile such passengers were carried, and that if defendant was required to perform the service at the rate of three cents per mile it would also be required to expend more for the performance of such service than it would receive from the passenger, and that the revenue or income which it would receive from all sources of profit other than passenger traffic would not be sufficient to enable it to make in profits an amount equal to the amount which it would lose on its passenger business. (P. 63.)

(*e.*) That three cents per mile was not reasonable compensation for the services performed. (P. 63.)

ARGUMENT.

The questions presented by the record in this case were so recently before this court and so thoroughly discussed by counsel in the case of *John H. Reagan et al.* v. *The Farmers' Loan & Trust Company et al.*, and were so fully considered by the court in the opinion rendered in that case, that an extended argument in this case may seem wholly unnecessary. It is insisted, however, that the facts in the record of this case present stronger reasons for a judicial inquiry as to whether the rates in question were reasonable than were ever presented in any case of a similar character brought to the attention of this or of any other court.

The answer of the defendant substantially sets forth the following facts:

The alleged overcharges were made upon a portion of defendant's line built by an Arkansas corporation and originally known as the St. Louis, Arkansas and Texas Railway Company (of Arkansas). The last named company consolidated with a corporation of similar name organized under the laws of the State of Missouri, and a corporation organized under the laws of the State of Arkansas, known as the Missouri, Arkansas and Southern Railway Company. The company formed by such amalgamation assumed the name of the St. Louis Arkansas and Texas Railway Company (Consolidated), and its line of railway extended from Plymouth in the State of Missouri, where it connected with a line of railway belonging to defendant, through the mountains of north-western Arkansas to Fort Smith in the Arkansas valley. Before the institution of this suit the consolidated company had conveyed by deed all of its line of railway to defendant. The railway in question was a most expensive one to build. It was located, as before stated, through a mountainous region. There were many high and exceedingly long bridges, trestles and viaducts, and many natural obstacles were presented to overcome, which cost a vast amount of money. The original cost of the road in cash exceeded $40,000 per mile, and in addition to this amount there was required to be expended on the St. Louis, Arkansas and Texas Railway (of Arkansas), after its completion, the sum of $500,000 in cash, in order to make the road safe for travelers. (Pages 61, 62.)

That from the time of the completion of the railway to the time of the trial, defendant had never, at any time, been able to earn from all sources of revenue a sum which would yield one per cent. upon the actual cash cost of the road. That if defendant was not permitted to charge a higher rate for the transportation of passengers than

three cents per mile, *its earnings from all sources of every nature and nature, character or kind, would not be sufficient to pay the expenses actually incurred in the operation of the railroad and the taxes thereon.* That it was not reasonable to expect that the business of the defendant, for years, would be sufficient to enable it to earn one per cent. on the actual capital expended in the construction of the road. *That the actual cost of carrying each passenger over that portion of railway, mentioned in plaintiff's petition, and over all of its railway referred to in the petition, exceeded the sum of three cents per mile. That the actual cost of carrying passengers,* including the actual cost of carrying plaintiff, *was three and three-tenths cents per mile*, and that three cents per mile for the service rendered by defendant in carrying passengers at the time in plaintiff's petition mentioned was not a reasonable compensation for the services performed, and that five cents per mile would be a reasonable sum for such services.

Plaintiff's demurrer to so much of the answer as set forth the foregoing facts, was sustained, and it can be said here as was said in the case mentioned above.

"But one conclusion can be drawn from that action, and that is that upon the taking of their testimony defendants (plaintiffs here) became satisfied that the particular facts were as stated in the bills, and that the conclusions to be drawn from such facts could not be overthrown by any other matters."

But defendants did not content itself with resting upon the allegations of fact set forth in its answer, but at the trial had present in court numerous witnesses, including not only all of its own officials but the traffic managers of other corporations, by whom it offered to prove each and every fact stated above, and particularly *that the actual cost to the defendant of carrying passengers was three and three-tenths cents per mile, and that if defendant was required to carry passengers at three cents per mile, the loss which it would incur thereby would exceed its net profits from all other sources of income.*

Was it lawful for the Legislature of Arkansas to require the defendant to carry passengers for three cents a mile when the actual cost of carrying such passengers was three and three-tenths cents per mile, the which by so doing the defendant's total income from all sources would be insufficient to pay up taxes and operating expenses, and consequently which, by so doing, no profit whatever would accrue to the defendant by reason of its investment?

The question is not *how much profit* to the defendant would be a reasonable allowance, but was it lawful to compel the defendant to do business at an admitted positive loss.

It not disputed that the road was an exceedingly expensive one to construct; there is no charge that there was either waste in the construction or unnecessary loss in the management of the railroad; it is not disputed that it actually cost more to carry passengers than defendant was allowed to charge, and it is conceded that if defendant complied with the act in question its operating expenses and taxes would exceed its income from all sources.

Upon these facts it is contended that the judgment should be reversed because

(a.) The act in question, as applied to the defendant, amounted to a violation of the contract between the State of Arkansas and the various corporations which constructed or subsequently acquired the line of railway in question,

(b.) As the act required the defendant to do business at a positive loss, it therefore constitutes a taking of defendant's property without just compensation or due process of law, and

(c.) Defendant should have been heard on its allegation that three cents a mile was an unreasonable rate.

Violation of Contract.

When the St. Louis, Arkansas and Texas Railway Company (of Arkansas) was organized, it was provided by law, as follows: Mansfield's Digest of the Statutes of Arkansas, Sec. 5473:

"The legislature may, when any such railroad shall be opened for use, from time to time, alter or reduce the rates of toll, fare, freights, or other profits upon such road; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent. per annum on the capital actually paid in; nor unless, on an examination of the amounts received and expended, to be made by the secretary of state, he shall ascertain that the net income derived by the company, from all sources for the year then last past, shall have exceeded an annual income of fifteen per cent. upon the capital of the corporation actually paid in. (Sec. 29, Act of July 23, 1868.)"

It will not be disputed that by the laws of Arkansas there passed to the defendant all the rights enjoyed by the St. Louis, Arkansas and Texas Railway Company (of Arkansas) under the statute above cited. (Secs. 5511 to 5517, Mansfield's Arkansas Digest.)

The record in this case discloses that the defendant by charging five cents a mile for carrying passengers had never been able to earn one per cent. on the amount of capital actually expended in cash in the construction of its railway.

The purpose of the act of 1868 was to induce corporations to build into a then practically undeveloped state. It was known that the investment of money in Arkansas railroads was a doubtful venture, and the legislature intended that the great risk assumed by investors should be partially offset by a solemn assurance of good profit in case the investment should be a successful one.

But it will be argued that the act in question is not a violation of the contract made by the State of Arkansas with the defendant, because section 8, article 12 of the Constitution of that states is as follows:

"Corporations may be formed under general laws; which laws "may, from time to time, be altered or repealed. The General As- "sembly shall have the power to alter, revoke or annul any charter of "incorporation now existing and revocable at the adoption of this "constitution, or any that may hereafter be created, whenever, in "their opinion it may be injurious to the citizens of this state; *in such "manner, however, that no injustice shall be done to the corporators.*"

It is conceded that the above constitutes a part of defendant's charter. But the italicised portion of the foregoing constitutional provision clearly show that the reserved power to amend or repeal is not unconditional, laws can be amended only when *no injustice shall be done to the corporators* and we contend that a great injustice in this case is done "to the corporators," if the legislature by its act can compel the defendant to do business at an actual loss. The constitution of Arkansas constitutes a part of the contract of the state with the defendant and the constitution solemnly assured the defendant that its charter or the rights which it acquired under the charter of another company should never be so altered or amended as to do injustice to the corporators.

Is it not an injustice of unparalled character to deny the defendant the right to any profit?

And we further insist that if the laws and the Constitution of Arkansas contained no express authority to fix rates, that *there is contained in every charter an implied contract that the corporation shall be allowed to make* SOME *profit.*

THE TAKING OF DEFENDANT'S PROPERTY WITHOUT JUST COMPENSATION OR DUE PROCESS OF LAW.

In Railroad Commission Case, 116 U. S. 331, this court said:

"Under the pretense of regulating fares and rates, the state cannot require a railroad corporation to carry persons or property *without reward.*"

We could well rest our case upon this judicial utterance and the admitted fact in this case that it actually cost the defendant more to carry passengers than the amount permitted by the legislative act in question. It is idle to discuss this branch of our case, for this court in the cases cited as well as in *Chicago, etc., Railway Company* v. *Minn.*, 134 U. S., 418, and *Chicago, etc., Railway Company* v. *Wellman*, 143 U. S., 339, and in other cases that might be mentioned, has announced the doctrine that rates must be reasonable in order to be valid and we submit that no rate is reasonable which does not allow the carrier an amount equal at least to the actual cost of the services performed.

We do not think that it has ever been held that the defendant in a proceeding like this should be denied the right to prove that the rate charged was reasonable. Such right is co-extensive with the right of a shipper to prove in a common law action that a given rate is unreasonable. Defendant in this case, under the general issue, offerred to prove by a score of witnesses who were present in the court room, that three cents was an unreasonable charge, if the law was obeyed, and that five cents a mile was a reasonable rate. Under any view of the questions involved, defendant was entitled to have this question judicially determined.

The law in question is the one which was before this court in the case of *Dow* v. *Beidleman*, 125 U. S., 681, but in that case the only admitted fact was that "the net yearly income will pay less than one and one half per cent. on the original cost of the road, and only a little more than two per cent. on the amount of its bonded debt, but there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation or its trustees." In this case, the admitted facts shown by the record are, that if the law in question was enforced defendant would earn absolutely no profit whatever upon its original capital, and would absolutely fail to earn its operating expenses, as the actual cost of carrying passengers exceeded three and three-tenths cents per mile, and the revenues of the defendant from all other sources were insufficient to make good the loss which the enforcement of the three-cent tariff would occasion.

In *Dow* v. *Beidelman* the court said: "Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law."

In this case it does appear that there is such a confiscation as amounts to a taking of property, because it is admitted that if the law in question is enforced defendant will be required to do the business for less than the actual cost and will fail to earn its operating expenses and taxes, and in the above case the court quoted approvingly from

the decision in the Railroad Commission Case, 116 U. S., 331, wherein it was said:

"This power to regulate is not a power to destroy; and limita-
"tion is not the equivalent of confiscation. Under pretense of
"regulating fares and freights, *the state cannot require a railroad*
"*company to carry persons and property without reward.*"

In the opinion affirming this case rendered by the Supreme Court of Arkansas, but two cases were cited by the court upon the questions presented here. These cases were the cases of *Dow* v. *Beidelman*, *supra*, and the Minnesota case, both of which strongly maintain the doctrine that a carrier is entitled to some compensation, and in this case we do not ask the court to say what compensation it is entitled to, but to declare that the defendant could not be compelled to perform the service at less than its actual cost, and that defendant had the right to be heard on the question of whether the rate was a reasonable one.

The Supreme Court of Arkansas reversed the case because "the
"answer seeks to test the justice of the act, not by its effect upon the
"net earnings of the entire road, but by its effect upon the net earn-
"ings of that portion of its road acquired by purchase as well as of
"that part formerly owned by one of the consolidating companies."

"But," says the court, "that is not the correct test. The appel-
"lant cannot claim the right to earn a net profit from every mile,
"section or other part into which its road might be divided. It can
"only claim a profit from the operation of its entire line, and attack
"as unjust an act that denies it the right to fix such rates as will yield
"a profit upon its aggregate business."

This is, if true, a singularly unfortunate principle of law, for its theory is that the carrier may make sufficient profit off of its business in one state to justify it in carrying passengers at a loss in another state, and that, therefore, the burden of transportation, instead of being so equalized as to rest fairly upon all, may be greatly increased in some localities for the benefit of the people in other sections. This cannot be the law. It cannot be that the defendant can be required to perform any service at less than actual cost because (first), such a law would be unreasonable and unjust to the corporation, and (second), it would be most unjust and unreasonable to make good the loss incurred in carrying passengers in the State of Arkansas by increasing the amount which should be charged to passengers in other states.

And again, the statement of the court, we submit, is hardly a fair one. The defendant did not select "a particular mile or section of its road," but its pleading and proof covered all of defendant's lines in Arkansas and all of its lines in Missouri, which were a part thereof.

Surely it cannot be the law that if a corporation should build a line of railway into the State of Arkansas, or, being in the state, should build a branch, that such corporation could not only be deprived of the right to make a reasonable profit on its business, but could be compelled to do business at an actual loss. What inducement would remain for capital to invest in that state?

The rate charged admitted to be reasonable.

But the case should be reversed, if for no other reason, because of the admission that the rate charged was reasonable. Defendant in its answer charged the fact to be that the rate charged was reasonable, and that the rate fixed by law was unreasonable. The demurrer admitted the truth of these allegations. And defendant offered to support the allegations of its answer by the testimony of numerous witnesses.

Respectfully submitted.

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Office Supreme Court, U. S.
FILED
NOV 22 1894
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

St. Louis & San Francisco Railway Company,
Plaintiff in Error,
vs.
John Stevenson,
Defendant in Error.
No. 174.

St. Louis & San Francisco Railway Company,
Plaintiff in Error,
vs.
M. H. Trimble,
Defendant in Error.
No. 175.

St. Louis & San Francisco Railway Company,
Plaintiff in Error,
vs.
A. H. Carter,
Defendant in Error.
No. 176.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

STATEMENT FOR PLAINTIFFS IN ERROR.

GEORGE R. PECK,
EDWARD D. KENNA,
A. T. BRITTON and
A. B. BROWNE,
ATTORNEYS FOR PLAINTIFFS IN ERROR.

THE GUNTHORP-WARREN PRINTING COMPANY, 53 DEARBORN ST., CHICAGO.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

St. Louis & San Francisco Railway Company, *Plaintiff in Error,* vs. John Stevenson, *Defendant in Error.*	No. 174.
St. Louis & San Francisco Railway Company, *Plaintiff in Error,* vs. M. H. Trimble, *Defendant in Error.*	No. 175.
St. Louis & San Francisco Railway Company, *Plaintiff in Error,* vs. A. H. Carter, *Defendant in Error.*	No. 176.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT FOR PLAINTIFFS IN ERROR.

These cases being all of the same character as *St. Louis & San Francisco Railway Company* v. *John B. Gill*, No. 173, counsel beg that they may be taken as submitted upon the brief filed in behalf of the plaintiff in error in that case, and that there be considered in connection therewith the following additional statement.

STATEMENT.

The cases of *Railway Company* v. *Stevenson* and *Railway Company* v. *Carter* are almost precisely alike, the only difference being that the plaintiff in the first case was carried from Fort Smith to Lillie, a distance of eleven miles, and in the other case was carried from Fort Smith to Lancaster, a distance of about nineteen miles.

The only difference between these cases and the case of *Railway Company* v. *Gill*, No. 173, is that in addition to the facts set forth in the Gill case, it is averred in the answer filed in these cases that:

The stations named in the petition were on the line of railway originally constructed by the Missouri, Arkansas and Southern Railway Company, which was one of the companies that consolidated with the St. Louis, Arkansas and Texas Railway Company (of Arkansas) (mentioned in the Gill case) and formed a part of the St Louis, Arkansas and Texas Railway (Consolidated).

It was also averred in another count that said Missouri, Arkansas and Southern Railway Company did not construct the entire line from Fayetteville to Fort Smith, but that the continuity of said line was broken at the Arkansas river, where the defendant constructed a bridge under the act of Congress entitled, "An Act to authorize the construction of a bridge across the Arkansas river at the town of Van Buren, Crawford County, Arkansas," approved July 3, 1882, and defendants in their answer aver that by the provisions of said act there was expressly given to the defendant and the secretary of war of the United States the sole and exclusive right to fix and control the rates and tolls which should be charged upon said bridge, and that a separate charge was made to plaintiff for carrying him across said bridge; but as plaintiff in error does not urge the defense based on this count, its contents are immaterial.

In these cases, as in the Gill case, a demurrer was sustained to all the counts in the answer except the first count, which was a general denial.

At the trial of these cases as at the trial of the Gill case, the defendant offered to prove by witnesses who were present all of the facts set forth in the special defenses stricken out as before stated upon defendant's demurrer, and to specifically prove the following facts:

That the actual cost of the defendant's *entire* line was over $50,000 per mile, that the gross earnings per mile of the defendant's line had never exceeded $3,000 per mile and that the operating ex-

penses had always been and would continue to be about $2,400 per mile.

From the foregoing it will be seen that the defendant, when charging the alleged excessive rate of fare, had only been able to earn less than one and one-half per cent upon the actual cash cost of its line of railway.

Defendant further offered to prove in these cases that the actual cost of carrying passengers over the railway described in plaintiff's petition (formerly the Missouri, Arkansas and Southern) was three and one-half cents per mile.

The facts in the case of *Railway* v. *Trimble*, No. 475, are precisely like the facts in the *Stevenson and Carter* cases, except that in the *Trimble* case the plaintiff was not carried across the bridge at Fort Smith, but was carried from Lillie to Van Buren, a distance of seven miles, both stations being, however, on the line originally known as the Missouri, Arkansas and Southern Railway.

While counsel feel that there is practically no difference in the facts of all four cases, they thought it best to call attention to such differences as exist.

Respectfully submitted.

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A. T. BRITTON AND A. B. BROWNE,

Attorneys for Plaintiffs in Error.

Office Supreme Court U. S.
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CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE ST. LOUIS, ETC., Plaintiff in Error, vs. JOHN B. GILL. } 173.

and

THE SAME vs. JOHN STEVENSON. } 174.

and

THE SAME vs. M. H. TRIMBLE. } 175.

and

THE SAME vs. A. H. CARTER. } 176.

In Error to the Supreme Court of Arkansas.

BRIEF FOR DEFENDANTS IN ERROR.

These several cases, brought to recover damages for overcharges of fare by plaintiff in error, under the Arkansas law, are precisely similar as to the legal principles

involved, and vary, in their facts, in no substantial point to affect the application of these principles; and the cases may therefore well be submitted together.

The facts and proceedings are truly stated, in effect, in the two briefs submitted by plaintiff in error, and they need not be repeated by us.

The court's attention is here, in the beginning, called to the want of an assignment of errors in all of these records, in open disregard of the statute, and of the rules of this court; and we must therefore ask a dismissal of the several writs of error herein. (Sec. 997, R. S., Rule 21 of this Court.)

Then it is respectfully submitted, there is no jurisdiction in this court to review these cases, as no Federal question is involved.

The point attempted to be raised, which seems to be the main one relied on by plaintiff in error, as to the passage of the act by the legislature of Arkansas, under which these suits arose, is foreclosed (*Dow* v. *Beidelman, 49 Ark., 325; S. C., 125 U. S., 680*); and upon the question of the passage of a law by a legislature, the decision of the highest court of the particular State is conclusive. (*In re Duncan, 139 U. S., 449.*)

The attack on that act as offering an affront, in any sense, to the Constitution of the United States presents no Federal question either, as the authorities all leave what is contemplated by that act as a matter of regulation by State legislatures (*Dow* v. *Beidelman, 125 U. S., sup.*), and so says *Reagan* v. *Farmers, &c., 154 U. S., 362*, and many other cases that might be cited if needed.

The plaintiff may have, under the decision in the *Pacific Railroad Removal Cases, 115 U. S., 1*, possibly removed these cases to the proper United States court, but failing to do that, and taking her chances in the State court, she is here now just as any other litigant and must be so treated.

There is so slight a tinge of Federal question here, if any, no legal microscope can exactly locate and define it, and it is evident these writs of error are without merit, and are prosecuted merely for delay; too frivolous to need further argument, and they are again asked to be dismissed, or if not dismissed, the court believing there is jurisdiction here, the judgments be affirmed with interest and ten per cent. damages as "delay cases." (*Texas, &c.*, v. *Volk, 151 U. S., 73.*)

The enforcement of this practice, here and now, would have a softening and beneficial influence touching the habit of bringing cases here to delay and hinder parties, who have rightfully recovered on claims so small, their counsel can not, even for show or parade, afford to print a brief of any very respectable length after the order of briefs usually filed.

Should the court, however, be of opinion there are errors sufficiently assigned, and there is a Federal question, however faint, presented, let us look at it a moment.

The effort is to attack the right of the States to classify railroads, and regulate rates and charges of the same. This is, in brief, the point, and this is emphatically disposed of in the *Reagan case, 154 U. S., sup.*, and in *Dow* v. *Beidleman, 125 Ib., sup.* But besides these, many other citations could be added, and no authority more clearly and forcibly sustains us, than the opinion of Mr. Justice Hemingway in the *Gill case (173), (Rec., 69–76,)* in which every material question involved in these cases is considered with great exactness and discrimination, and we here refer to it as fully to all intents and purposes as if inserted here at length, and made part of this brief. We can not add to it. And it will be noted by this court, that opinion rules and controls in the other three cases (174–5–6).

In the Stevenson case (174) a short opinion is delivered, which, after affirming the opinion in the *Gill case*,

refers to the matter of a separate or increased charge for passage over the bridge across the Arkansas river, and shows the passage was continuous, and by act of Congress of July 3, 1882, no higher charge could be made. (Rec. in 174, pp. 18–19.)

Respectfully submitted.

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